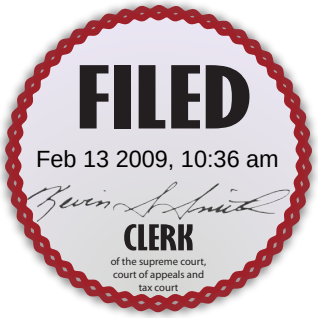

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IN THE
COURT OF APPEALS OF INDIANA

JUAN OCHOA,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A04-0807-CR-420
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0707-FA-29

February 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Juan Ochoa appeals his convictions and forty-two year sentence for Class A felony dealing in cocaine and Class A felony possession of cocaine with intent to deliver. We affirm.

Issues

Ochoa raises two issues on appeal, which we restate as:

I. whether the trial court was required to sever the charges; and

II. whether his forty-two year sentence is appropriate.

Facts

On June 21, 2007, a confidential informant working with the Elkhart County Drug Task Force purchased $375 of cocaine from Ochoa. The confidential informant remained in a parked car while Ochoa approached the passenger window and passed in a plastic baggie with powder cocaine in exchange for the cash. Officer Brian Chomer was undercover, driving the car, and witnessed the transaction. After lab testing, the substance was confirmed as adulterated powder cocaine weighing 13.93 grams.

On July 2, 2007, officers served a search warrant on Ochoa's apartment. Inside the apartment, officers found baggies containing white powder, powder residue, $747 in cash, and digital scales. The baggies were a variety of sizes and weights, including six small baggies weighing less than one gram each, three baggies weighing fourteen grams each, and larger baggies, one of which contained over 180 grams. The white powder was identified as cocaine, and officers recovered approximately 226 grams.

The State charged Ochoa on July 9, 2007, with two counts of Class A felony dealing in cocaine and one count of Class A felony possession of cocaine with intent to deliver. The State amended the charging information on April 28, 2007, to one count of Class A dealing in cocaine for the June 21, 2007 buy and one count of Class A possession with intent to deliver for the items recovered during the July 2, 2007 search. The cause proceeded to trial and a jury found Ochoa guilty on both counts. On May 22, 2008, the trial court sentenced Ochoa to forty-two years on each count, to be served concurrently. This appeal followed.

Analysis

I. Severing the Offenses

Ochoa argues that the trial court improperly joined the charges in one trial and doing so constituted fundamental error. The State contends that Ochoa has waived any claims regarding severing the charges. Indiana Code Section 35-34-1-12 provides: "The right to severance of offenses or separate trial is waived by failure to make the motion at the appropriate time." Ochoa concedes that no motion to sever was made prior to or during his trial.

In light of his failure to request a severance of the charges, Ochoa suggests we read Indiana Code Section 35-34-1-12 together with the previous section of the chapter to conclude, "a defendant's right to severance is automatic and absolute without the necessity of a motion if the offenses are joined solely because the offenses are of similar character." Appellant's Br. p. 8. The previous section of the statute provides:

> Whenever two or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. . .

Ind. Code § 35-34-1-11(a). Under this section, in one case a motion to sever must be granted and in the other case the trial court has discretion to grant or deny the motion. Our supreme court has stated, "when crimes are joined solely on the basis that they are of the same or similar conduct, the trial court must separate them upon motion of the defendant." Runyon v. State, 537 N.E.2d 475, 477 (Ind. 1989) (emphasis added) (assessing a defendant's rights under Indiana Code Section 35-34-1-11(a)). The statutes do not create any automatic right to severance. The record indicates that Ochoa failed to make an appropriate motion to sever and therefore waived this claim.

Ochoa alternatively argues that no waiver occurred because he could not have made a knowing, voluntary, and intelligent one. He points out that he did not speak English and has only a sixth grade education. Ochoa cannot cite to any authority to support his argument that as a defendant charged with multiple counts he must personally be advised of the potential for severance of his charges and then consent to the failure to seek it on the record. Ochoa was represented by counsel, a translator was present at pre-trial hearings, and Ochoa presents no evidence that he was misled or ill-advised. This argument does not alter our conclusion that Ochoa waived any claims regarding severance of his charges.

Waiver notwithstanding, even if Ochoa requested severance prior to trial, it would have properly been denied. Ochoa claims the two charges were joined solely because they were of the same or similar character. The two instances of charged conduct, however, occurred within ten days and were uncovered as a result of the ongoing work of undercover police officers. The charges stemmed from Ochoa's drug operation and were connected as part of a single scheme or plan; therefore, the trial court would have had discretion under Indiana Code Section 35-34-1-1(a) to grant or refuse severance. See Richter v. State, 598 N.E.2d 1060, 1063 (Ind. 1992) (concluding that two counts of dealing in cocaine were not joined solely because they were of similar character, but instead they involved an ongoing investigation in a relatively short period of time).

When a decision to sever multiple charges is within the trial court's discretion, we will reverse only upon a showing of clear error. Heinzman v. State, 895 N.E.2d 716, 721 (Ind. Ct. App. 2008). "In making such a determination, the trial court must consider the number of offenses charged, the complexity of the evidence to be offered, and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." Id. The evidence was relatively straightforward and the jury had to consider only two charges. Regarding the dealing charge stemming from the June 21, 2007 sale, Officer Chomer testified Ochoa was the person who sold the cocaine to the confidential informant. Regarding the possession with intent to deal charge stemming from execution of the July 2, 2007 search warrant, Officer Chomer and other officers testified that Ochoa was present at the residence with 226 grams of cocaine, packaging material, scales, and $747 in cash. There was adequate independent evidence to support

each conviction had they been tried separately and Ochoa was not prejudiced by the joinder of the charges.

II. Sentence

Ochoa argues a forty-two year sentence is inappropriate in light of his character and the nature of the offense. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

The advisory sentence for a Class A felony is thirty years. I.C. § 35-50-2-4. The trial court enhanced the advisory sentence by twelve years after considering the aggravating and mitigating circumstances, and ordered the sentences to be served concurrently. Ochoa argues the nature of his crime and his character did not warrant such enhancement to his sentence. Nothing in Ochoa's character strikes us as particularly exemplary. Ochoa admitted during the sentencing hearing that he is in this country illegally. While here illegally, Ochoa violated laws other than those governing his alien status. His criminal history includes a conviction for operating while intoxicated and then a violation of probation and a failure to appear for that case. He had misdemeanor convictions for battery and criminal conversion and a charge for public intoxication. Ochoa admitted to problems with substance abuse, but his addiction does not excuse his

illegal action. Ochoa suggests his character should be highly regarded because he was working in the United States to send money back to Mexico for his wife and two children. His family will no longer receive that income, however, because Ochoa chose to engage in illegal drug operations.

Ochoa argues that the nature of his drug dealing offense is "relatively minor" compared to other potential cases of the same level. Appellant's Br. p. 14. He points out that his offense did not involve the use of weapons, drugs measuring in vast quantities such as kilos, or significant amounts of money. Still, the amount of baggies, cocaine, paraphernalia, and cash involved was evidence of a drug enterprise. The Class A felonies Ochoa was convicted of only required the amounts of cocaine involved to be more than three grams—approximately 226 grams were found in the apartment and the sale to the confidential informant involved 13.9 grams. Ochoa has not persuaded us that the nature of these offenses or his character merit a reduction of the sentence. The forty-two year sentence is appropriate.

Conclusion

Ochoa is not entitled to relief on his claim that the charges should have been severed. His forty-two year sentence is appropriate in light of his character and the nature of the offenses. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.